

§ 370.3

12 CFR Ch. III (1–12 Edition)

(m) *Mandatory convertible debt.* The term “mandatory convertible debt” means senior unsecured debt that is required by the terms of the debt instrument to convert into common shares of the issuing entity on a fixed and specified date, on or before the expiration of the guarantee, unless the issuing entity:

(1) Fails to timely make any payment required under the debt instrument, or

(2) Merges or consolidates with any other entity and is not the surviving or resulting entity.

(n) *Issuance period.* (1) Except as provided in paragraph (n)(2) of this section, the term “issuance period” means

(i) With respect to the issuance, by a participating entity that is either an insured depository institution, an entity that has issued FDIC-guaranteed debt before April 1, 2009, or an entity that has been approved pursuant to § 370.3(h) to issue FDIC-guaranteed debt after June 30, 2009, and on or before October 31, 2009, of:

(A) Mandatory convertible debt, the period from February 27, 2009, to and including October 31, 2009, and

(B) All other senior unsecured debt, the period from October 14, 2008, to and including October 31, 2009; and

(ii) With respect to the issuance, by any other participating entity, of

(A) Mandatory convertible debt, the period from February 27, 2009, to and including June 30, 2009, and

(B) All other senior unsecured debt, the period from October 14, 2008, to and including June 30, 2009.

(2) The “issuance period” for a participating entity that has been approved to issue FDIC-guaranteed debt pursuant to § 370.3(k) of this part is the period after October 31, 2009, and on or before April 30, 2010.

(o) *TAG expiration date.* The term “TAG expiration date” means December 31, 2010 unless the Board of Directors of the FDIC (the “Board”), for good cause, extends the transaction account guarantee program beyond December 31, 2010 for an additional period of time not to exceed one year, in which case the term “TAG expiration date” means the last day of such additional period of time. Good cause exists if the Board finds that the economic

conditions and circumstances that led to the establishment of the transaction account guarantee program are likely to continue beyond December 31, 2010 and that extending the transaction account guarantee program for an additional period of time will help mitigate or resolve those conditions and circumstances. If the Board decides to extend the transaction account guarantee program beyond December 31, 2010 for an additional period of time, it will do so without further rulemaking; however, the FDIC will publish notice of any extension no later than October 29, 2010. Participating entities must update the disclosures required by § 370.5(h)(5), as necessary, to reflect the current TAG expiration date, including any extension of such date.

[73 FR 72266, Nov. 26, 2008, as amended at 74 FR 9524, Mar. 4, 2009; 74 FR 12082, Mar. 23, 2009; 74 FR 45098, Sept. 1, 2009; 74 FR 54747, Oct. 23, 2009; 75 FR 20263, Apr. 19, 2010; 75 FR 36510, June 28, 2010]

§ 370.3 Debt Guarantee Program.

(a) Upon the uncured failure of a participating entity to make a timely payment of principal or interest as required under an FDIC-guaranteed debt instrument, the FDIC will pay the unpaid principal and/or interest, in accordance with § 370.12 and subject to the other provisions of this part.

(b) *Debt guarantee limit.* (1) Except as provided in paragraphs (b)(2) through (b)(6) of this section, the maximum amount of outstanding debt that is guaranteed under the debt guarantee program for each participating entity at any time is limited to 125 percent of the par value of the participating entity’s senior unsecured debt, as that term is defined in § 370.2(e)(1)(i) (excluding mandatory convertible debt), that was outstanding as of the close of business September 30, 2008 and that was scheduled to mature on or before June 30, 2009.

(2) If a participating entity that is an insured depository institution had either no senior unsecured debt as that term is defined in § 370.2(e)(1)(i), or only had federal funds purchased, outstanding on September 30, 2008, its debt guarantee limit is two percent of its consolidated total liabilities as of September 30, 2008. For the purposes of this

Federal Deposit Insurance Corporation

§ 370.3

paragraph (b)(2) of this section, the term “federal funds purchased” means:

(i) For insured depository institutions that file Reports of Condition and Income, unsecured “federal funds purchased” as that term is used in defining “Federal Funds Transactions” in the Glossary of the FFIEC Reports of Condition and Income Instructions, and

(ii) For insured depository institutions that file Thrift Financial Reports, “Federal Funds” as that term is defined in the Glossary of the 2008 Thrift Financial Report Instruction Manual.

(3) If a participating entity, other than an insured depository institution, had no senior unsecured debt as that term is defined in § 370.2(e)(1)(i) outstanding on September 30, 2008, the entity may seek to have some amount of debt covered by the debt guarantee program. The FDIC, after consultation with the appropriate Federal banking agency, will decide, on a case-by-case basis, whether such a request will be granted and, if granted, what the entity’s debt guarantee limit will be.

(4) If an entity becomes an eligible entity after October 13, 2008, the FDIC will establish the entity’s debt guarantee limit at the time of such designation.

(5) If an affiliate of a participating entity is designated as an eligible entity by the FDIC after a written request and positive recommendation by the appropriate Federal banking agency (or if the affiliate has no appropriate Federal banking agency, a written request and positive recommendation by the appropriate Federal banking agency of the affiliated insured depository institution), the FDIC will establish the entity’s debt guarantee limit at the time of such designation.

(6) The FDIC may make exceptions to an entity’s debt guarantee limit. For example, the FDIC may allow a participating entity to exceed the limit determined in paragraph (b)(1) or (b)(2) of this section, reduce the limit below the amount determined in paragraph (b)(1) or (b)(2) of this section, and/or impose other limits or requirements after consultation with the entity’s appropriate Federal banking agency.

(7) If a participating entity issues debt identified as guaranteed under the debt guarantee program that exceeds its debt guarantee limit, it will be subject to assessment increases and enforcement action as provided in § 370.6(e).

(8) A participating entity that is both an insured depository institution and a direct or indirect subsidiary of a parent participating entity may, absent direction by the FDIC to the contrary, increase its debt guarantee limit above the limit determined in accordance with paragraphs (b)(1) through (b)(6) of this section, provided that:

(i) The amount of the increase does not exceed the debt guarantee limit(s) of one or more of its parent participating entities;

(ii) The insured depository institution provides prior written notice to the FDIC and to each such parent participating entity of the amount of the increase, the name of each contributing parent participating entity, and the starting and ending dates of the increase; and

(iii) For so long as the institution’s debt guarantee limit is increased by such amount, the debt guarantee limit of each contributing parent participating entity is reduced by an amount corresponding to the amount of its contribution to the amount of the increase.

(9) The debt guarantee limit of the surviving entity of a merger between or among eligible entities is equal to the sum of the debt guarantee limits of the merging eligible entities calculated on a pro forma basis as of the close of business September 30, 2008, absent action by the FDIC after consultation with the surviving entity and its appropriate Federal banking agency.

(10) For purposes of determining the amount of guaranteed debt outstanding under paragraph (b)(1) of this section, debt issued in a foreign currency will be converted into U.S. dollars using the exchange rate in effect on the date that the debt is funded.

(c) *Calculation and reporting responsibility.* Participating entities are responsible for calculating and reporting to the FDIC the amount of senior unsecured debt as defined in § 370.2(e)(1)(i) as of September 30, 2008.

§ 370.3

12 CFR Ch. III (1–12 Edition)

(1) Each participating entity shall calculate the amount of its senior unsecured debt outstanding as of the close of business September 30, 2008, that was scheduled to mature on or before June 30, 2009.

(2) Each participating entity shall report the calculated amount to the FDIC, even if such amount is zero, in an approved format via FDICconnect no later than December 5, 2008.

(3) In each subsequent report to the FDIC concerning debt issuances or balances outstanding, each participating entity shall state whether it has issued debt identified as FDIC-guaranteed debt that exceeded its debt guarantee limit at any time since the previous reporting period.

(4) The Chief Financial Officer (CFO) or equivalent of each participating entity shall certify the accuracy of the information reported in each report submitted pursuant to this section.

(d) *Expiration of Guarantee.* (1) With respect to debt that is issued before April 1, 2009 by any participating entity, the guarantee expires on the earliest of the mandatory conversion date for mandatory convertible debt, the maturity date of the debt, or June 30, 2012.

(2) With respect to debt that is issued on or after April 1, 2009, by a participating entity that is either an insured depository institution, a participating entity that has issued guaranteed debt before April 1, 2009, a participating entity that has been approved pursuant to § 370.3(h) to issue guaranteed debt after June 30, 2009, and on or before October 31, 2009, or a participating entity that has been approved pursuant to § 370.3(k) to issue guaranteed debt after October 31, 2009, the guarantee expires on the earliest of the mandatory conversion date (for mandatory convertible debt), the maturity date of the debt, or December 31, 2012.

(3) With respect to guaranteed debt that is issued on or after April 1, 2009 by a participating entity other than an entity described in paragraph (d)(2) of this section, the guarantee expires on the earliest of the mandatory conversion date for mandatory convertible debt, the maturity date of the debt, or on June 30, 2012.

(e) Debt cannot be issued and identified as guaranteed by the FDIC if:

(1) The proceeds are used to prepay debt that is not FDIC-guaranteed;

(2) The issuing entity has previously opted out of the debt guarantee program, except as provided in § 370.5(d);

(3) The issuing entity has had its participation in the debt guarantee program terminated by the FDIC or is not a participating entity;

(4) The issuing entity has exceeded its debt guarantee limit for issuing guaranteed debt as specified in paragraph (b) of this section,

(5) The debt is owed to an affiliate, an institution-affiliated party, insider of the participating entity, or an insider of an affiliate or

(6) The debt does not otherwise meet the requirements of this part for FDIC guaranteed debt.

(f) The FDIC's agreement to include a participating entity's senior unsecured debt in the debt guarantee program does not exempt the entity from complying with any applicable law including, without limitation, Securities and Exchange Commission registration or disclosure requirements.

(g) *Long term non-guaranteed debt option.* On or before 11:59 p.m., Eastern Standard Time, December 5, 2008, a participating entity may also notify the FDIC that it has elected to issue senior unsecured non-guaranteed debt with maturities beyond June 30, 2012, at any time, in any amount, and without regard to the guarantee limit. By making this election the participating entity agrees to pay to the FDIC the nonrefundable fee as provided in § 370.6(f).

(h) *Applications for exceptions, eligibility, and issuance of certain debt.* (1) The following requests require written application to the FDIC and the appropriate Federal banking agency of the entity or the entity's lead affiliated insured depository institution:

(i) A request by a participating entity to establish, increase, or decrease its debt guarantee limit,

(ii) A request by an entity that becomes an eligible entity after October 13, 2008, for an increase in its presumptive debt guarantee limit of zero,

(iii) A request by a non-participating surviving entity in a merger transaction to opt in to either the debt guarantee program or the transaction account guarantee program,

(iv) A request by an affiliate of an insured depository institution to participate in the debt guarantee program,

(v) A request by a participating entity to issue FDIC-guaranteed mandatory convertible debt,

(vi) A request by a participating entity that is neither an insured depository institution nor an entity that has issued FDIC-guaranteed debt before April 1, 2009, to issue FDIC-guaranteed debt after June 30, 2009, and on or before October 31, 2009,

(vii) A request by a participating entity to issue senior unsecured non-guaranteed debt after June 30, 2009, and

(viii) A request by a participating entity to issue FDIC-guaranteed debt after October 31, 2009 under the Emergency Guarantee Facility pursuant to paragraph (k) of this section.

(2) Each letter application must describe the details of the request, provide a summary of the applicant's strategic operating plan, describe the proposed use of the debt proceeds, and

(i) With respect to an application for approval of the issuance of mandatory convertible debt, must also include:

(A) The proposed date of issuance,

(B) The total amount of the mandatory convertible debt to be issued,

(C) The mandatory conversion date,

(D) The conversion rate (*i.e.*, the total number of shares of common stock that will result from the conversion divided by the total dollar amount of the mandatory convertible debt to be issued),

(E) Confirmation that all applications and all notices required under the Bank Holding Company Act of 1956, as amended, the Home Owners' Loan Act, as amended, or the Change in Bank Control Act, as amended, have been submitted to the applicant's appropriate Federal banking agency in connection with the proposed issuance, and

(F) Any other relevant information that the FDIC deems appropriate;

(ii) With respect to an application pursuant to paragraph (h)(1)(vi) of this section to extend the period for

issuance of FDIC-guaranteed debt to and including October 31, 2009, the entity's plans for the retirement of the guaranteed debt, a description of the entity's financial history, current condition, and future prospects, and any other relevant information that the FDIC deems appropriate;

(iii) With respect to an application pursuant to paragraph (h)(1)(vii) of this section to issue senior unsecured non-guaranteed debt, a summary of the applicant's strategic operating plan and the entity's plans for the retirement of any guaranteed debt; and

(iv) With respect to an application pursuant to paragraph (h)(1)(viii) of this section to issue FDIC-guaranteed debt under the Emergency Guarantee Facility, a projection of the sources and uses of funds through December 31, 2012, a summary of the entity's contingency plans, a description of the collateral that an entity can make available to secure the entity's obligation to reimburse the FDIC for any payments made pursuant to the guarantee, a description of the plans for retirement of the FDIC-guaranteed debt, a description of the market disruptions or other circumstances beyond the entity's control that prevent the entity from replacing maturing debt with non-guaranteed debt, a description of management's efforts to mitigate the effects of such disruptions or circumstances, conclusive evidence that demonstrates an entity's inability to issue non-guaranteed debt, and any other relevant information.

(3) In addition to any other relevant factors that the FDIC deems appropriate, the FDIC will consider the following factors in evaluating applications filed pursuant to paragraph (h) of this section:

(i) For applications pursuant to paragraphs (h)(1)(i), (h)(1)(ii), (h)(1)(iii), and (h)(1)(v) of this section: The proposed use of the proceeds; the financial condition and supervisory history of the eligible/surviving entity;

(ii) For applications pursuant to paragraph (h)(1)(iv) of this section: The proposed use of the proceeds; the extent of the financial activity of the entities within the holding company structure; the strength, from a ratings

§ 370.3

12 CFR Ch. III (1–12 Edition)

perspective of the issuer of the obligations that will be guaranteed; the size and extent of the activities of the organization;

(iii) For applications pursuant to paragraph (h)(1)(vi) of this section: The proposed use of the proceeds; the entity's plans for the retirement of the guaranteed debt, the entity's financial history, current condition, future prospects, capital, management, and the risk presented to the FDIC;

(iv) For applications pursuant to paragraph (h)(1)(vii) of this section: The entity's plans for the retirement of the guaranteed debt; and

(v) For applications pursuant to paragraph (h)(1)(viii) of this section, the applicant's strategic operating plan, the proposed use of the debt proceeds, the entity's plans for the retirement of the FDIC-guaranteed debt, the entity's contingency plans, the nature and extent of the market disruptions or other circumstances beyond the entity's control that prevent the entity from replacing maturing debt with non-guaranteed debt, the collateral that an entity can make available to secure the entity's obligation to reimburse the FDIC for any payments made pursuant to the guarantee, management's efforts to mitigate the effects of such conditions or circumstances, the evidence that demonstrates an entity's inability to issue non-guaranteed debt, and the risk presented to the FDIC.

(4) Applications required under this part must be in letter form and addressed to the Director, Division of Supervision and Consumer Protection, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

(5) The filing deadlines for certain applications are:

(i) At the same time the merger application is filed with the appropriate Federal banking agency, for an application pursuant to paragraph (h)(1)(iii) of this section (which must include a copy of the merger application);

(ii) October 31, 2009, for an application pursuant to paragraph (h)(1)(v) of this section that is filed by a participating entity that is either an insured depository institution, an entity that has issued FDIC-guaranteed debt before April 1, 2009, or an entity that has been

approved pursuant to paragraph (h) of this section to issue FDIC-guaranteed debt after June 30, 2009, and on or before October 31, 2009;

(iii) June 30, 2009, for an application pursuant to paragraph (h)(1)(v) of this section that is filed by a participating entity other than an entity described in paragraph (h)(5)(ii) of this section;

(iv) June 30, 2009, for an application pursuant to paragraph (h)(1)(vi); and

(v) April 30, 2010, for applications pursuant to paragraph (h)(1)(viii).

(6) In granting its approval of an application filed pursuant to paragraph (h) of this section the FDIC may impose any conditions it deems appropriate, including without limitation, requirements that the issuer

(i) Hedge any foreign currency risk, or

(ii) Pledge collateral to secure the issuer's obligation to reimburse the FDIC for any payments made pursuant to the guarantee.

(iii) Limit executive compensation and bonuses, and/or

(iv) Limit or refrain from the payment of dividends.

(i) *Time limits on issuance of guaranteed debt.* (1) A participating entity that is either an insured depository institution, an entity that has issued FDIC-guaranteed debt before April 1, 2009, or an entity that has been approved pursuant to paragraph (h) of this section to issue FDIC-guaranteed debt after June 30, 2009 and on or before October 31, 2009, may issue FDIC-guaranteed debt under the debt guarantee program through and including October 31, 2009.

(2) A participating entity other than an entity described in paragraph (i)(1) of this section may issue FDIC-guaranteed debt under the debt guarantee program through and including June 30, 2009.

(j) *Issuance of non-guaranteed debt after June 30, 2009.* (1) After obtaining the FDIC's prior written approval to issue non-guaranteed debt pursuant to paragraph (h)(1) of this section, any participating entity that has elected pursuant to paragraph (g) of this section to issue senior unsecured non-guaranteed debt with maturities after June 30, 2012 and that has paid the fee provided in § 370.6(f), may issue after

Federal Deposit Insurance Corporation

§ 370.5

June 30, 2009 senior unsecured non-guaranteed debt in any amount with maturities on or before June 30, 2012. A participating entity that has both made the election provided by paragraph (g) of this section and paid the fee provided by § 370.6(f) does not need the FDIC's approval to issue senior unsecured non-guaranteed debt that matures after June 30, 2012.

(2) After obtaining the FDIC's prior written approval to issue non-guaranteed debt pursuant to paragraph (h)(1) of this section, any participating entity, other than an entity described in paragraph (j)(1) of this section, may issue after June 30, 2009 senior unsecured non-guaranteed debt in any amount with any maturity.

(k) *Emergency Guarantee Facility.* In the event that a participating entity that is either an insured depository institution or an entity that has issued FDIC-guaranteed debt on or before September 9, 2009 is unable, after October 31, 2009, to issue non-guaranteed debt to replace maturing senior unsecured debt as a result of market disruptions or other circumstances beyond the entity's control, the participating entity may, with the FDIC's prior approval under paragraph (h) of this section, issue FDIC-guaranteed debt after October 31, 2009, and on or before April 30, 2010. Any such issuance is subject to all of the terms and conditions imposed by the FDIC in its approval decision as well as all of the provisions of this part, including without limitation, the payment of the applicable assessment and compliance with the disclosure requirements.

[73 FR 72266, Nov. 26, 2008, as amended at 74 FR 9524, Mar. 4, 2009; 74 FR 12083, Mar. 23, 2009; 74 FR 54747, Oct. 23, 2009]

§ 370.4 Transaction Account Guarantee Program.

(a) In addition to the coverage afforded to depositors under 12 CFR Part 330, a depositor's funds in a noninterest-bearing transaction account maintained at a participating entity that is an insured depository institution are guaranteed in full (irrespective of the standard maximum deposit insurance amount defined in 12 CFR 330.1(n)) from October 14, 2008 through:

(1) The date of opt-out, in the case of an entity that opted out prior to December 5, 2008;

(2) December 31, 2009, in the case of an entity that opted out effective on January 1, 2010; or

(3) June 30, 2010, in the case of an entity that opts out of the transaction account guarantee program effective on July 1, 2010; or

(4) The TAG expiration date, in the case of an entity that does not opt out.

(b) In determining whether funds are in a noninterest-bearing transaction account for purposes of this section, the FDIC will apply its normal rules and procedures under § 360.8 (12 CFR 360.8) for determining account balances at a failed insured depository institution. Under these procedures, funds may be swept or transferred from a noninterest-bearing transaction account to another type of deposit or nondeposit account. Unless the funds are in a noninterest-bearing transaction account after the completion of a sweep under § 360.8, the funds will not be guaranteed under the transaction account guarantee program.

(c) Notwithstanding paragraph (b) of this section, in the case of funds swept from a noninterest-bearing transaction account to a noninterest-bearing savings deposit account, the FDIC will treat the swept funds as being in a noninterest-bearing transaction account. As a result of this treatment, the funds swept from a noninterest-bearing transaction account to a noninterest-bearing savings account, as defined in 12 CFR 204.2(d), will be guaranteed under the transaction account guarantee program.

[73 FR 72266, Nov. 26, 2008, as amended at 74 FR 45098, Sept. 1, 2009; 75 FR 20264, Apr. 19, 2010]

§ 370.5 Participation.

(a) *Initial period.* All eligible entities are covered under the temporary liquidity guarantee program for the period from October 14, 2008, through December 5, 2008, unless they opt out on or before 11:59 p.m., Eastern Standard Time, December 5, 2008, in which case the coverage ends on the date of the opt-out.

(b) The issuance of FDIC-guaranteed debt subject to the protections of the